(4)

Office - Supreme Court, U. S.
JUL 28 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EUGENE T. EDWARDS,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
Jurisdiction	8
Opinions below	8
Questions involved	8
Reasons for granting petition	10
Prayer for writ	12
Brief in support of petition for writ	13
Opinions below, jurisdiction and summary statement	13
Specifications of error	13
Argument	15
Summary of argument	15
Point A. (Unwarranted interference)	15
Ponit B. (Improper holding of evidence)	15
Point C. (Disregard of undisputed evidence)	15
Point D. (No substantial evidence)	15
Conclusion	28

Table of Cases Cited.

Ballston Stillwater Knitting Co. v. *National Labor Relations Board*, 98 F. (2d) 758, C. C. A. 2	12, 27
Chesapeake & Ohio Railway Co. v. *Martin*, 283 U. S. 209	11, 22
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	23
Foote Bros. Gear & Machine Corp'n. v. *National Labor Relations Board*, 114 F. (2d) 611, C. C. A. 7	24
Interlake Iron Corp'n. v. *National Labor Relations Board*, 131 F. (2d) 129, C. C. A. 7	25
Kansas City Power & Light Co. v. *National Labor Relations Board*, 111 F. (2d) 340, C. C. A. 8	12, 27
Martel Mills v. *National Labor Relations Board*, 114 F. (2d) 624, C. C. A. 4	12, 27

Page

Midland Steel Products Co. v. *National Labor Relations Board*, 113 F. (2d) 800, C. C. A. 6 ..... 10, 16
National Labor Relations Board v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292 23
National Labor Relations Board v. *William Davies Co.*, 135 F. (2d) 179, C. C. A. 7 ..... 10, 16
National Labor Relations Board v. *Empire Furniture Co.*, 107 F. (2d) 92, C. C. A. 6 ..... 11, 12, 19, 27
National Labor Relations Board v. *Indiana & Michigan Electric Co.*, 318 U. S. 9 21
National Labor Relations Board v. *Jones & Laughlin Steel Corp'n.*, 301 U. S. 1 ..... 11, 15
National Labor Relations Board v. *Pick Mfg. Co.*, 135 F. (2d) 329, C. C. A. 7 25
National Labor Relations Board v. *Sands Mfg. Co.*, 306 U. S. 332 ..... 12, 27
National Labor Relations Board v. *Swank Products*, 108 F. (2d) 872, C. C. A. 3 ..... 12, 27
National Labor Relations Board v. *Thompson Products*, 97 F. (2d) 13, C. C. A. 6 ..... 11, 21
National Labor Relations Board v. *Union Pacific Stages*, 99 F. (2d) 153, C. C. A. 9 ..... 11, 21
North Electric Mfg. Co. v. *National Labor Relations Board*, 123 F. (2d) 887, C. C. A. 6 ..... 11, 19
Pennsylvania Railroad Company v. *Chamberlain*, 288 U. S. 333 ..... 11, 22
Texarkana Bus Co. v. *National Labor Relations Board*, 119 F. (2d) 480, C. C. A. 8 ..... 11, 19
Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 19
Wilson & Co. v. *National Labor Relations Board*, 120 F. (2d) 913, C. C. A. 7 ..... 12, 27

STATUTES.

Judicial Code, Section 240(a), as amended 8
National Labor Relations Act, 29 U. S. Code, Sections 150, et seq. 19
National Labor Relations Act, Section 10(e) and (f), 29 U. S. Code, Sec. 160(e) and (f) 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 298

PEYTON PACKING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Peyton Packing Company, Inc., respectfully shows that the record here consists of (1) a transcript of the record of proceedings before the National Labor Relations Board, designated as Volume I, below, and here referred to as R. —; with (2) a supplementary record consisting of proceedings before the Circuit Court of Appeals, herein referred to as S. R. —; and (3) appendix to brief of the Board which was petitioner below, herein referred to as Board Appdx. —; together with appendix to brief of Peyton Packing Co., Inc., respondent below, herein designated as P. P. Co. Appdx. —.

Summary Statement of Matter Involved.

Based on charges filed by Amalgamated Meat Cutters & Butcher Workmen of N. A., A. F. of L., Local 606, the National Labor Relations Board on October 23, 1942, instituted proceedings under the National Labor Relations Act against petitioner, Peyton Packing Company, Inc., alleging that it had discriminatorily discharged twenty employees (R. 10-13).

Justifiable grounds, not now necessary to mention, were set out by the company for the discharges of eight of these men, and as to the other twelve it was shown as a defense that their employment was terminated in May, 1942, because of their wilful violation of the following rule which had been posted in both English and Spanish more than three months previously:

> "NOTICE TO ALL EMPLOYEES
>
> NO EMPLOYEE SHALL ENGAGE IN SOLICITATION OF ANY KIND WHILE ON PROPERTY OF THIS COMPANY, OR WHILE WORKING ON COMPANY TIME. DISREGARD OF THIS RULE WILL RESULT IN IMMEDIATE DISCHARGE AND NO EXCEPTIONS WILL BE MADE" (R. 18-22).

After close of the evidence the trial examiner found as to all employees that there had been no discrimination and no wrongful conduct by petitioner (Intermediate Report, Dec. 22, 1942, R. 27-52).

The National Labor Relations Board itself on May 18, 1943, made a decision sustaining the trial examiner except as to the employees discharged for violation of the rule above set out, but as to those nine the board held it beyond the lawful power of this petitioner to promulgate and enforce such a rule; that an attempt to do so was discriminatory and an unfair labor practice and ordered petitioner to reinstate them with back pay (R. 67-103).

Two were eliminated from the reinstatement order by amendment of June 10, 1942 (R. 120-123).

Petitioner pleaded as a defense at the hearing before the trial examiner (R. 18-22), and the undisputed evidence showed:

1. Petitioner packs meat and employs an average of 370 men (Harris, P. P. Co. Appdx. 49).

2. In March, 1940, *prior to present proceeding*, a *C. I. O. union* filed charges with the National Labor Relations Board against petitioner alleging interference with rights of employees and favoritism toward an employees' association (Harris, P. P. Co. Appdx. 50-52).

3. A hearing before a trial examiner was had on that charge, and on January 13, 1941, in his intermediate report he found that employees were solicited to join such association during working hours (P. P. Co. Appdx. 52), and this was used by the board in its former order and decision of June 11, 1941, as a contributing factor to its holding therein that petitioner had violated Section 8(2) of the Act (P. P. Co. Appdx. 53).

4. No appeal was taken from this decision and after extended correspondence between petitioner's attorney and the board's Sixteenth Regional Director (Exhibits 23, and 24 of the company, in evidence P. P. Co. Appdx. 55-56), regarding the terms of the notice to be posted, the company on Sept. 23, 1941, posted such notices (P. P. Co. Appdx. 204, Exhibit 22, in evidence P. P. Co. Appdx. 54), a portion of its procedure being conditioned on the result of a decision by this Court in the case of *National Labor Relations Board* v. *Virginia Electric & Power Company*, then pending.

5. The notices informed petitioner's employees that it would not support the Association and would not inter-

fere with, restrain or coerce its employees in their right to self-organization, etc. (See Company Exhibit 22, mentioned above.)

6. Aside from, and independently of, such notice the company had issued strict orders that the Act must be complied with as regards all labor matters (Peyton, P. P. Co. Appdx. 175; Miles, 173; Gandara, 151; Chauvet, 92; Hamilton 95-96; and Kessler, 120).

7. On December 22, 1941, this court decided the case of *National Labor Relations Board* v. *Virginia Electric & Power Company* (314 U. S. 469) but did not pass on the question in which this petitioner was interested, and information of this fact reached it early in January, 1942 (Harris, P. P. Co. Appdx. 56).

8. Thereupon, petitioner sought advice of its attorney as to means of preventing a recurrence of the conditions in the plant which led to the prior charge by the C. I. O. and its attendant complaint, hearing and order of the board, and was advised by such attorney to post, in both English and Spanish, a written notice setting forth its policy as shown by a copy of such notice prepared by said attorney as set out above (Harris, P. P. Co. Appdx. 58; Miles, 171; Peyton, 176; Board Exhibit 8, Board Appdx. 141, in Evidence Board Appdx. 28).

9. Such notice was posted in conspicuous places in the plant on January 26, 1942, and copies have been kept posted at all times since (Harris, P. P. Co. Appdx. 61).

10. At least one copy of such notice was torn down and carried to Allen Williams, an organizer for the complaining union herein at some time prior to the discharges in May, 1942, as hereinafter set out (Williams, P. P. Co. Appdx. 6; Harris, 62). This notice was discussed by Williams at union meetings prior to any of the discharges;

and the contents and meaning of such notice were known to and fully understood by all of the employees who were subsequently discharged for its violation (Lopez, P. P. Co. Appdx. 7; Quintana, 17; Alarcon, 20-21; Renteria, 10-11; Diaz, 12; Barreda, 13; Arciniaga, 14-15; Alarcon, 19; Mena, 25; and Ochotorena, 30).

11. At a time after the hearing in the C. I. O. case and before May, 1942, some of respondent's employees, including Espiridion Muro and Raul Aguilar, attempted to form an independent union, and as an initial step procured a charter, notice of the procurement of which appeared in the newspapers and thus came to the attention of the management of the company, whereupon they immediately warned Muro and Aguilar that there was to be no solicitation on company property. Muro and his associates then dropped the whole thing (Muro, P. P. Co. Appdx. 126, 130; Raul Aguilar, 138; Gandara, 165).

12. After posting the rule and before May, 1942, petitioner had refused to permit candidates for political office to solicit votes among its employees; refused to permit a representative of a well-known life insurance company to solicit applications for life insurance; and refused to permit solicitors from the Community Chest, Red Cross and United States War Bond Committees to solicit funds from employees, but petitioner itself undertook this work in behalf of the last-named public organizations (Harris, P. P. Co. Appdx. 67, 77).

13. Early in May, 1942, Muro complained to Gandara, through whom the company had previously warned him not to solicit for an independent union, that solicitation was going on all over the plant for some union other than his own, and expressed dissatisfaction at what he said appeared to be discrimination against him and his associates (Muro, P. P. Co. Appdx. 127; Gandara, 153), all

of which was reported by Gandara to the company (Harris, P. P. Co. Appdx. 63, 85; Gandara, 154; Miles, 172).

14. Petitioner again consulted its attorney for guidance in the light of these circumstances, and he told its officers that they must do one of two things: either tear down the rule and forget about it, and thereby lose all control and discipline they ever had over their men, or enforce the rule by discharging the employees who had violated it; and that no matter which they did they would have another complaint filed against them before the board,—by the C. I. O. or some other association if they didn't discharge the men, and by the A. F. of L. if they did. Petitioner was advised by its attorney to investigate, and have a stenographic record made of interviews with those said to have violated the rule, and if it had been violated, enforce it by discharge (Harris, P. P. Co. Appdx. 82; Gandara, 154; Peyton, 176-177).

15. Following this advice, company officials, who do not speak Spanish, instructed Gandara, who speaks both English and Spanish fluently, to attempt to find out whether the rule had in fact been violated. He did so, and turned in the names of those said by other employees to have been guilty of violation of the rule in question, whereupon officials interviewed thirteen employees, and, following advice of counsel, had a stenographer present. Four of the thirteen were then discharged as the result of such interviews and the others denied having violated the rule. These were informed that further investigation would be made and if it convinced the management that they had in fact violated the rule, they, too would be discharged (Harris, P. P. Co. Appdx. 63; Gandara, 154; See Stenographic reports of interviews; Company Exhibits 2-13 and 17-21. P. P. Co. Appdx. 184-197, in evidence P. P. Co. Appdx. 76).

16. On instructions from the management Gandara made further investigation and reported back that he was unable to get corroboration concerning four men (Jose Fierro, Martin Gaytan, Faustino Cortez and Juan Yudico), and they were not discharged, but he reported additional information relative to the others and consequently their employment was terminated in the second interview by company officials (Harris, P. P. Co. Appdx. 65; Miles, 172; Gandara, 155-166. Reports of interviews P. P. Co. Appdx. 190, 192, 193, 194, 197, 199, 200, 201, 202, in evidence P. P. Co. Appdx. 76).

17. The A. F. of L. Union did thereafter file with the Sixteenth Regional Director of the Board charges of discrimination by the company against those discharged for violation of the rule and also those discharged for other reasons, and this case resulted.

18. Between December 1, 1941, and June 9, 1942, the employment of 114 servants of the Peyton Packing Company, Inc., was ended (Company Exhibit 30, P. P. Co. Appdx. 208, in evidence, P. P. Co. Appdx. 78-79). The union filed charges as to 20 of them. It was not shown or suggested that any of the other 94 were union men.

The board in refusing to accept the findings of its trial examiner wholly disregarded all of the above undisputed evidence, and sought to support its decision against petitioner by certain isolated alleged utterances of minor company employees, which statements, if made, were wholly unauthorized, and, with one exception, were said to have been directed to employees other than those who were actually discharged.

The stenographic reports of the interviews with the men involved and their discharge slips show that the reason for

their discharges was violation of the company rule against solicitation (Company Exhibits 32-45, P. P. Co. Appdx. 213-218, in evidence, P. P. Co. Appdx. 80, 81, 82), and petitioner's president, L. F. Miles, testified under oath that that was the only reason (P. P. Co. Appdx. 172).

The Circuit Court of Appeals sustained the board in every respect and granted its application for enforcement of its order (S. R. 134).

Jurisdiction.

The final decree of the United States Circuit Court of Appeals for the Fifth Circuit was entered July 10, 1944 (S. R. 138).

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925 (28 U. S. Code Section 347 (a)), and Section 10(e) and (f) of the National Labor Relations Act (29 U. S. Code, Section 160(e) and (f)), herein called the Act.

Opinions Below.

The findings of fact, conclusions of law and order of the National Labor Relations Board dated May 18, 1943, and June 10, 1943 (R. 67 and 120), are reported in 49 N. L. R. B. 828, and 50 N. L. R. B. 355, respectively.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was filed June 21, 1944 (S. R. 134), but at this time has not been published in the Federal Reporter.

Questions Involved.

1. Did the Circuit Court of Appeals err in failing to sustain the company's first counter-proposition that:

"The evidence conclusively showing that Gregorio Alarcon, George Arciniaga, Manuel Barreda, Nazario Diaz,

Eugenio Lopez, L. J. Mena, Eduardo Ochotorena, Manuel Quintana and Manuel Renteria were each discharged by the Peyton Packing Company because of its reasonable belief that they had wilfully violated its rule, theretofore posted, forbidding any employee from soliciting on company property or time with discharge plainly stated therein as the penalty for its breach, and the evidence conclusively showing that each of said employees had in fact deliberately violated said rule, respondent was acting entirely within its rights and the discharges were legally proper and it is beyond the Board's power to order reinstatement of any of them as attempted in paragraph 2(a), (b) and (c) in its final order of June 10, 1943."

2. May the National Labor Relations Board and the Circuit Court of Appeals consider as unfavorable evidence against an employer, with respect to whether it had violated the Act, the fact that an official of the employer had declined to confer with an individual who claimed to represent a majority of the company's employees where that individual never at any time produced any proof that he did represent any of them?

3. May the National Labor Relations Board and the Circuit Court of Appeals disregard reasonable, direct, substantial, materially relevant and undisputed evidence favorable to an employer to the effect that the only reason for the discharge of an employee was his violation of a long-posted rule of the company, and support a decision of discriminatory discharge against it solely by indirect and circumstantial evidence consisting of inferences drawn from the fact that an official of the company, when no election to determine a bargaining representative had been held, had declined to confer with a labor organizer who produced no proof that he actually represented any of the company's employees, together with inferences drawn from isolated

and unauthorized remarks by minor employees contrary to the publicly announced policy of the management when in each instance the employee to whom the remarks were attributed denied having made them, and when, if made at all, there is no evidence that they were repeated to any other person, and when no action by the company in harmony with such remarks was ever taken with reference to any person alleged to have been so addressed, with the exception of one who is a self confessed liar and who admitted intentional violation of the rule for which he was discharged?

4. Did the Circuit Court of Appeals err in failing to sustain the company's second counter-proposition that:

The evidence discloses no lawful basis for the Board's findings and conclusions that the company had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and its order to "cease and desist" as set forth in paragraph 1 (a) and 1 (b) of its order of May 18, 1943 (R. 101-102), supplemented by paragraph 2 (a) to (e), inclusive, on June 10, 1943 (R. 120), is without lawful support.

Reasons for Granting Petition.

1. The petition should be granted because the decision of the Circuit Court of Appeals herein sought to be reviewed, relative to the matter of the company rule, is in conflict with decisions of the Circuit Courts of Appeals for the Sixth and Seventh Circuits:

Midland Steel Products Company v. *National Labor Relations Board,* 113 F. (2d) 800, par. 8-14, C. C. A. 6;

National Labor Relations Board v. *William Davies Company,* 135 F. (2d) 179, par. 6 & 7, C. C. A. 7.

2. The decision also is probably in conflict with applicable decisions of this Honorable Court to the effect that the

Act does not interfere with the normal exercise of the right of the employer to discharge its employees, for example:

National Labor Relations Board v. *Jones & Laughlin Steel Corp'n*, 301 U. S. 1, 46.

3. In disregarding the undisputed evidence favorable to the employer the decision of the court below is further in conflict with the following decisions of this Honorable Court, and Circuit Courts of Appeals:

Chesapeake & Ohio Railway Company v. *Martin*, 283 U. S. 209, 214;

Pennsylvania Railroad Company v. *Chamberlain*, 288 U. S. 333, 343;

National Labor Relations Board v. *Union Pacific Stages*, 99 F. (2d) 153, 177, C. C. A. 9;

National Labor Relations Board v. *Thompson Products*, 97 F. (2d) 13, 15.

4. In considering the fact that one of its officers had declined to confer with a union organizer, who did not furnish any proof of his authority to represent any of the company's employees, as evidence unfavorable to petitioner on the question of whether it had violated the Act, the decision of the Court below is in conflict with the following decisions of the Sixth and Eighth Circuits:

Texarkana Bus Company v. *National Labor Relations Board*, 119 F. (2d) 480, par. 6-10, C. C. A. 8;

National Labor Relations Board v. *Empire Furniture Company*, 107 F. (2d) 92, par. 3, C. C. A. 6;

North Electric Mfg. Co. v. *National Labor Relations Board*, 123 F. (2d) 887, par. 5-6, C. C. A. 6.

5. In holding petitioner responsible for sporadic anti-union statements of unauthorized minor employees the decision below is in conflict with prior decisions of this

Honorable Court and with decisions of other Circuit Courts of Appeals as follows:

National Labor Relations Board v. *Sands Manufacturing Co.*, 306 U. S. 332, 341-342;

Martel Mills v. *National Labor Relations Board*, 114 F. (2d) 624, par. 11, C. C. A. 4;

National Labor Relations Board v. *Empire Furniture Co.*, 107 F. (2d) 92, par. 2, C. C. A. 6;

Kansas City Power & Light Co. v. *National Labor Relations Board*, 111 F. (2d) 340, par. 8, C. C. A. 8;

Ballston Stillwater Knitting Co. v. *National Labor Relations Board*, 98 F. (2d) 758, 762, C. C. A. 2;

Wilson & Co. v. *National Labor Relations Board*, 120 F. (2d) 913, 920, par. 6, C. C. A. 7;

National Labor Relations Board v. *Swank Products*, 108 F. (2d) 872, par. 2-3, C. C. A. 3.

6. It is a matter of national importance that this Honorable Court decide whether any method of procedure for the maintenance of discipline is left open to those employers who, rightly or wrongly, have been found by the board to have violated the Act by a previous toleration of solicitation for membership by representatives of some union said by the board to have been thereby favored.

WHEREFORE, your petitioner prays that a writ of certiorari be issued to review the final decree of the United States Circuit Court of Appeals for the Fifth Circuit entered in that court in the case numbered and entitled on its docket, No. 10,960, *National Labor Relations Board, Petitioner*, v. *Peyton Packing Company, Inc., Respondent*, to the end that this cause may be reviewed by this Court and that the judgment herein of said Circuit Court of Appeals be reversed.

PEYTON PACKING COMPANY, INC.,
By EUGENE T. EDWARDS,
Counsel for Petitioner.